

## **Separation of Powers Seminar**

Justice Gorsuch

**Grading:** Grading in this course will be based on two short papers (66% of your grade) and class participation (33% of your grade).

**Short Papers:** Each student will be responsible for writing 2 short papers throughout the course. Papers may be up to 750 words. I will circulate a sign-up sheet before the course begins and students will be expected to sign up for 2 class sessions to share reaction papers. The sign ups will be first-come, first-serve. If you have not signed up by July 15, I will randomly assign you.

The afternoon before each class session, 4 students will each circulate a reaction paper on TWEN to facilitate the discussion. You are responsible for circulating your reaction paper to the class by **5:00 pm** the day before the class for which you are assigned. Your reaction paper may analyze, critique, apply, or comment on anything in that class session's readings that you find of interest.

**Casebook:** Peter M. Shane, Harold H. Bruff, Neil J. Kinkopf, *Separation of Powers Law: Cases and Materials* (4th ed. 2018).

### **Class 1—Introduction**

- Vile, Constitutionalism and the Separation of Powers (1967), excerpt Marsilius of Padua
- Encyclopedia Britannica, Marsilius of Padua
- John Locke, Second Treatise, §§ 143, 144, 150, 159, 1689
- Montesquieu, Spirit of Laws, bk. 11, CHS. 6–7, 1748
- James Madison, Federalist, no. 37, 233–234, 11 Jan. 1788
- James Madison, Federalist, no. 47, 323–331, 30 Jan. 1788
- James Madison, Federalist, no. 48, 332–338, 1 Feb. 1788
- James Madison, Federalist, no. 51, 347–353, 6 Feb. 1788

### **Class 2—The Executive-Legislative Divide I (delegation)**

- Casebook 115–131
- Whitman v. American Trucking, 531 U. S. 457 (2001)
- Scalia, A Note on the Benzene Case, Regulation, July/August 1980 25–28
- Gundy v. United States, slip op.
- Caring Hearts v. Burwell excerpt from *A Republic if You Can Keep It*

### **Class 3—The Executive-Legislative Divide II (appointment and removal)**

- Casebook 488–505, 518–533, 541–561

### **Class 4—The Executive-Legislative Divide III (faithful execution)**

- Casebook 611–634

### **Class 5—The Executive-Judicial Divide I (independent judges)**

- Casebook 131–139
- The Founders Constitution 141–145 (The Federalist Nos. 78 & 79)
- Rehnquist, Judicial Independence, 38 U. Richmond L. Rev. 579 (2004)

- Oil States v. Greene Energy Services, slip op.

**Class 6—The Executive-Judicial Divide II (non-Article III courts)**

- Baude, Adjudication Outside Article III, 133 Harv. Law Review (forthcoming 2020)
- SEC v. Chenery Corp., 332 U. S. 194 (1947)
- Biestek v. Berryhill, slip op.
- Gorsuch, Power Without Law? *A Republic if You Can Keep It*

**Class 7—The Executive-Judicial Divide III (deference doctrines)**

- National Cable & Telecommunications Assn. v. Brand X, 545 U.S. 967 (2005)
- Auer v. Robbins, 519 U.S. 452 (1997)
- Gutierrez-Brizuela v. Lynch, 834 F. 3d 1142 (CA10 2016)
- Kisor v. Wilke slip op.

**Class 8—The Legislative-Judicial Divide I (prospectivity versus retroactivity)**

- Chevron Oil v. Huson, 404 U.S. 97 (1971)
- James Beam Distilling Co. v Georgia, 501 U.S. 529 (1991)
- Landsgraf v. USA Film Products, 511 U.S. 244 (1994)
- De Niz Robles v. Lynch, 803 F. 3d 1165 (CA10 2015)

**Class 9—The Legislative-Judicial Divide II (textualism)**

- Breyer, Active Liberty 85-101 (2005)
- Scalia, A Matter of Interpretation 3–37 (1997)
- United States v. Games-Perez, 667 F. 3d 1136 (CA10 2012); 695 F. 3d 1104 (CA 10 2012) (en banc)

**Class 10—The Legislative-Judicial Divide III (originalism)**

- Breyer, Active Liberty 115-31 (2005)
- Gorsuch, Originalism and the Constitution, *A Republic if You Can Keep It*

## Optional Readings

- Calabresi et al, The Rise and Fall of the Separation of Powers, 106 Northwestern L. Rev. 527, 527–550 (2012)
- Currie, Separating Judicial Power, 61 Law & Contemp. Probs. 7, 7–14 (1998) (5 pages)
- Bruff, Balance of Forces, Chapter 1: A Brief Constitutional History 3-32 (29 pages)
- Manning, What Divides Textualists From Purposivists?, 106 Colum. L. Rev. 70, 96–109 (13 pages)
- O'Scannlain, Politicians in Robes: The Separation of Powers and the Problem of Judicial Legislation, 101 Va. L. Rev. Online 31, 31–50 (2015)
- Zoldan, The Civil *Ex Post Facto* Clause, 2015 Wis. L. Rev. 727, 728–733, 768–761
- Manning, Lawmaking Made Easy, 191–204 (13 pages)
- Waldron, Separation of Powers in Thought and Practice?, 54 B. C. L. Rev 433 (2013)
- Huz & Michaels, The Cycles of Separation-of-Powers Jurisprudence, 126 Yale L. J. (2016)
- Calabresi, Some Normative Arguments for the Unitary Executive, 48 Ark. L. Rev. 23 (1995)
- Calabresi & Prakash, The President's Power to Execute the Laws, 104 Yale L. J. 541 (1994)
- Calabresi & Rhodes, The Structural Constitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1153 (1992)
- Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573 (1984)
- Woolhandler, Public Rights, Private Rights, and Statutory Retroactivity, 94 Geo. L. J. 1015, 1025 (2006)
- Easterbrook, Presidential Review, 40 Case W. Res. L. Rev. 905, 926 (1990)
- Redish, Separation of Powers, Judicial Authority, and the Scope of Article III, The Troubling Cases of Morrison and Mistretta, 39 DePaul L. Rev. 299 (1990)
- Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers
- Woolhandler & Nelson, Does History Defeat Standing Doctrine?, 102 Mich. L. Rev. 689, 695 (2004)
- Gorsuch, Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia, 66 Case Western L. Rev. 905 (2016)
- Barkow, Separation of Powers and the Criminal Law, 58 Stan. L. Rev. 989 (2006)
- Manning, Separation of Powers as Ordinary Interpretation, 124 Harv. L. Rev. 1393 (2011)
- Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953)
- Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612 (1996)
- Kagan, Presidential Administration, 114 Harv. L. Rev. 2245 (2001)
- Beerman, An Inductive Understanding of Separation of Powers, 63 Admin. L. Rev. 467 (2011)
- Magill, The Real Separation in Separation of Powers Law, 86 Va. L. Rev. 1127 (2000)
- Magill, Beyond Powers and Branches in Separation of Powers Law, 150 U. Pa. L. Rev 603 (2001)
- Neuborne, Judicial Review and Separation of Powers in France and the United States, 57 N. Y.U. L. Rev. 363, 372 (1982)

- Chapman & McConnell, Due Process as Separation of Powers, 121 Yale L. J. 1672, 1806 (2012)
- Lawson, The Rise and Rise of the Administrative State, 107 Harv. L. Rev. 1231, 1247 (1994)
- Schoenbrod, Power Without Responsibility (1993)
- Koh, The National Security Constitution: Sharing Power After the Iran-Contra Affair (1990)
- Lessig & Sunstein, The President and the Administration, 94 Colum. L. Rev. 1 (1994)
- Power, The Founders and the President's Authority over Foreign Affairs, , 40 Wm. & Mary L. Rev. 1471 (1999)
- Prakash, The Essential Meaning of Executive Power, 2003 U. Ill. L. Rev. 701 (2003)
- Prakash & Ramsey, The Executive Power over Foreign Affairs, 111 Yale L. J. 231 (2001)
- Sofaer, War, Foreign Affairs, and Constitutional Power (1984)
- Caminker, Allocating the Judicial Power in a “Unified Judiciary,” 78 Tex. L. Rev. 1513 (2000)
- Liebman & Ryan, “Some Effectual Power”: The Quantity of Quality of Decisionmaking Required of Article III Courts, 98 Colum. L. Rev. 696 (1998)
- Pushaw, Jr., The Inherent Powers of Federal Courts and the Structural Constitution, 86 Iowa L. Rev. 735 (2001)
- Pushaw, Jr., Justiciability and Separation of Powers: A Neo-Federalist Approach, 81 Cornell L. Rev. 393 (1996)
- Ely, Democracy and Distrust (book)
- Flaherty, The Most Dangerous Branch, 105 Yale L. J. 1725 (1996)
- Strauss, Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency, 72 Cornell L. Rev. 488 (1987)
- Coenen, A Constitution of Collaboration: Protecting Fundamental Values With Second-Look Rules of Interbranch Dialogue, 42 Wm. & Mary L. Rev. 1575 (2001)
- Slocum, RICO and the Legislative Supremacy Approach to Federal Criminal Lawmaking, 31 Loyola U. Chi. L. J. 639 (2000)
- Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962)
- Jeffries, Jr., Legality, Vagueness, and the Construction of Penal Statutes, 71 Va. L. Rev. 189 (1985)
- Gans, Strategic Facial Challenges, 85 B. U. L. Rev. 1333 (2005)
- Godsoe, Recasting Vagueness: The Case of Teen Sex Statutes, 74 Wash. & Lee L. Rev. 173 (2017)
- Hopwood, Clarity in Criminal Law, 54 Am. Crim. L. Rev. 695 (2017)
- Cheh, Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction, 42 Hastings L. J. 1325 (1991)
- Kuckes, Civil Due Process, Criminal Due Process, 25 Yale L. & Pol'y Rev. 1 (2006)
- Heriot, An Essay on the Civil-Criminal Distinction With Special Reference to Punitive Damages, 7 J. Contemp. Legal Issues 43, 45 (1996)
- Mann, Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law, 101 Yale L. J. 1795 (1992)
- Harrison, Jurisdiction, Congressional Power, and Constitutional Remedies, 86 Geo. L. J. 2513, 2516 (1998)
- Manning, Separation of Powers as Ordinary Interpretation, 124 Harv. L. Rev. 1940, 1942-1971 (2011)